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Before the
Federal Communications Commission
Washington, D.C. 20554

NOV 16 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Telecommunications)
Act of 1996)
)
Telecommunications Carrier's Use of)
Customer Proprietary Network)
Information and Other Customer)
Information)

CC Docket No. 96-115

To: The Commission

**REPLY COMMENTS OF
MERCEDES-BENZ USA, LLC**

Mercedes-Benz USA, LLC ("MBUSA"), on behalf of its parent company, DaimlerChrysler AG, hereby submits reply comments in response to the Second Further Notice of Proposed Rulemaking (the "FNPRM") released by the Federal Communications Commission (the "FCC" or the "Commission") on September 7, 2001 in the above-captioned proceeding. ^{1/} Specifically, MBUSA responds to issues relating to Section 222(f) of the Communications Act of 1934, as amended ("the Communications Act"), as raised in paragraph 22 of the FNPRM. There, the

^{1/} *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information*, CC Docket No. 96-115, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (rel. Sept. 7, 2001).

Commission noted that the Wireless Communications and Public Safety Act of 1999 ("911 Act") amended Section 222 by adding new Customer Proprietary Network Information ("CPNI") provisions intended to promote the greater deployment of wireless E911 services. Specifically, the 911 Act added "location" information to the definition of CPNI. The Commission sought comment on how, if at all, the 911 Act amendments would affect the formulation of its customer approval requirements pursuant to Section 222(c)(1). MBUSA submits that the amendments should, at a minimum, have no effect on the applicability of the Commission's CPNI rules to non-telecommunications carriers such as MBUSA.

I. BACKGROUND

MBUSA is an automobile importer and distributor dedicated to providing maximum safety and convenience to its customers, and is an industry leader in the use of innovative technology to promote these goals. One such innovation is telematics, the integration of location technology and wireless communications to provide a variety of automotive safety, security, productivity and convenience applications. MBUSA has partnered with ATX Technologies, Inc. ("ATX") to offer a telematics service known as Tele Aid. Tele Aid features a three-button system that permits users to call for emergency assistance, roadside assistance or other information. MBUSA currently has an installed base of over 300,000 Tele Aid

units, and expects to install roughly 200,000 units per year over the next several years. 2/

Tele Aid's services include an automated emergency call system that uses crash sensors to initiate a call for help in case of an accident. Tele Aid relies on a vehicle-mounted GPS satellite receiver to determine the vehicle's location. It then automatically relays this GPS-determined location information to an emergency call center by accessing an available analog cellular service in the area. In addition, a voice connection is established to the call center via the hands-free telephone section of the embedded Tele Aid device, allowing the vehicle's occupants to communicate with dispatchers to ensure that the appropriate emergency personnel are notified. In addition to this critical emergency function, Tele Aid can also be used to provide vehicle tracking services in case of theft, to obtain roadside assistance (including remote diagnostics), or to speak with the MBUSA Customer Assistance Center that can answer specific questions about the car. Although the data and voice communications between the vehicle and the call centers are carried over the networks of licensed cellular service providers, the Tele Aid customer has no contractual or other relationship with the cellular provider. 3/

2/ MBUSA notes that other auto manufacturers and distributors increasingly are following MBUSA's lead by offering similar services to their customers.

3/ The Tele Aid customer enters into a contract with MBUSA and ATX and pays an annual fee for monitoring, plus airtime charges. Section 11 of the agreement states that "You [the user] have no contractual relationship whatsoever with the wireless service carrier and you are not a third party beneficiary of any agreement between ATX or MBUSA and the carrier."

II. SECTION 222 PROVIDES NO AUTHORITY TO THE FCC TO APPLY CPNI RULES TO NON-TELECOMMUNICATIONS CARRIERS SUCH AS TELEMATICS PROVIDERS

MBUSA does not believe the Commission intends to exceed the explicit statutory language contained in Section 222 by applying its CPNI rules to non-telecommunications carriers such as automobile manufacturers that offer telematics services. Nevertheless, MBUSA makes the following points to illustrate why such application would be unambiguously contrary to the statute's plain language and purpose.

Throughout Section 222, the Congressional drafters refer only to "telecommunications carriers" and make no mention of third-party content or service providers. Specifically, Section 222(c)(1) prescribes privacy requirements only for "telecommunications carriers." Neither MBUSA nor its Tele Aid partner ATX is a telecommunications carrier. Therefore, telematics providers cannot be subject to Commission CPNI rules based on the express terms of Section 222.

For similar reasons, the customer information obtained by Tele Aid does not qualify as "CPNI" under the definition in Section 222(h)(1). CPNI is defined under that provision as:

information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service *subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship* 4/

4/ 47 U.S.C. § 222(h)(1)(A) (emphasis added).

Tele Aid users are not customers of a telecommunications carrier, and the customer information is not made available to any carrier (or anyone else for that matter) by virtue of any carrier-customer relationship. ^{5/} Moreover, as noted above, the location information obtained for use in providing Tele Aid services comes from a vehicle-mounted GPS receiver, not from any wireless carrier's network.

In its comments, Cingular Wireless argues that the Commission "should make clear that non-licensee entities are subject to its CPNI rules," even though Cingular admits that Section 222(f) does not apply to non-licensees. ^{6/} MBUSA maintains that, even if the Commission were to take Cingular's advice, providers of telematics would still not be covered under the CPNI rules because, as explained above, the information they obtain does not meet the definition of CPNI.

III. THERE IS NO POLICY BASIS FOR SUBJECTING TELEMATICS PROVIDERS TO THE CPNI RULES

As shown above, the Commission can not use the express terms of Section 222 as a basis for subjecting non-telecommunications carriers to its CPNI rules. Thus, in order to cover non-carriers under its rules, the Commission would have to

^{5/} CPNI also consists of "information contained in the bills pertaining to telephone exchange service or telephone toll service." 47 U.S.C. § 222(h)(1)(B). Obviously, providers of telematics do not receive telephone exchange or toll billing information.

^{6/} See Cingular Wireless Comments at 9.

rely on ancillary jurisdiction. 7/ There is no supportable policy justification, however, for such a significant expansion of the Commission's authority.

The use of ancillary jurisdiction in this instance would not promote any Congressional objective that cannot be achieved through the regulation of telecommunications carriers alone. The goal behind Section 222(f) was to ensure that subscribers to location services through their mobile telecommunications carriers be protected against unauthorized disclosure of such information. Increasing the regulatory burden on non-carrier telematics providers would do nothing to promote this goal, 8/ but, instead, would be a solution in search of a non-existent problem. As ATX correctly states in its comments, new telematics users are provided with an agreement that

sets forth the information disclosures and privacy policy. The details of the disclosure inform the subscriber how information is stored and for what purpose. It also informs the subscriber when the information will be disclosed. The agreement is a critical part of the relationship established when a vehicle owner subscribes to telematics services. 9/

In addition to this explicit, up-front disclosure, the mere use of an automobile-based telematics service in most cases logically implies that the user consents to the

7/ The Commission has stated that the use of its ancillary jurisdiction is warranted if "the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction." *Implementation of Sections 255 and 251(a)(s) of the Communications Act of 1934*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6461 (1999).

8/ Even the privacy rights advocates do not suggest application of CPNI rules to non-telecommunications carriers. *See generally*, Comments of Electronic Privacy Information Center et al.

9/ ATX Comments at 3.

limited use of location and other identifying information needed to respond to a user's request. 10/ As other commenters have noted, consent is often "implicit yet unambiguous" in certain circumstances, such as when asking for driving directions or requesting roadside assistance. 11/ In those situations, the telematics user understands that location and other information will be used, in the case of Tele Aid, by MBUSA, ATX or possibly other service providers contracted by MBUSA, to respond to the customer's request. Moreover, the U.S. Justice Department has previously recognized the concept of implicit consent to the release of identifying information. 12/ Thus, there is no rational policy basis for extending the application of the Commission's CPNI rules to providers of telematics services.

IV. CONCLUSION

As stated above, MBUSA does not believe that the Commission intended its discussion in paragraph 22 of the NPRM to suggest that non-telecommunications carriers such as providers of telematics, could be made subject

10/ By analogy to the Section 222 regime applicable to telecommunications carriers, such a view is consistent with the exemption from customer consent requirements that Congress carved out for the provision of CPNI to emergency dispatch providers and other public safety entities. *See* 47 U.S.C. § 222(d)(4). The primary purpose of telematics services is to provide quick access to precisely these types of emergency assistance entities.

11/ CTIA Comments at 13. *See also* Intellione Technologies Comments at 12.

12/ *See* memorandum Opinion for John C. Keeney, Acting Assistant Attorney General, Criminal Division, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (Sept. 10, 1996)(filed in CC Docket 94-102)("the caller, by dialing 911, has impliedly consented to such disclosure").

to the CPNI rules. MBUSA nevertheless wishes to clarify on the record that the statutory provisions are simply too unambiguous to arrive at such a conclusion. For the foregoing reasons, therefore, MBUSA requests that the Commission conclude that the amendments made by to Section 222 by the 911 Act should have no effect on the applicability of the Commission's CPNI rules to non-telecommunications carriers.

Respectfully submitted,

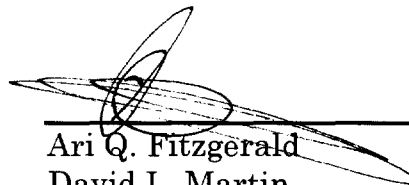
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Dated: November 16, 2001

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